UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

wellington

Mailed: April 11, 2006

Opposition No. 91162330

L.C. Licensing, Inc.

v.

Cary Berman

Before Hohein, Walters, and Walsh,
Administrative Trademark Judges.

By the Board:

This proceeding comes up on applicant's motion (filed August 9, 2004) for summary judgment. The parties have briefed the motion. For background purposes, we note the following.

On October 30, 2003, applicant filed an intent-to-use application (Serial No. 78320850) to register on the Principal Register the mark ENYCE (in standard character form) for an "custom automotive accessories, namely, fitted car covers, shift knobs, brake pads and wheels for land vehicles, license plate holders and spoilers for vehicles" in International Class 12.

Opposer filed a notice of opposition to registration of applicant's mark on the ground of likelihood of confusion.

Specifically, opposer alleges, *inter alia*, that it is the owner of the following registered marks:

ENYCE
for “apparel and headwear for men, women and children, namely, hats, caps, visors, headbands, shirts, jackets, jogging suits, pants, coats, T-shirts, shorts, tanktops, skirts, warm-up suits, sweatshirts and sweatpants” in International Class 25[1]; and

for "apparel and headwear for men, women and children, namely hats, caps, visors, headbands, shirts, jackets, jogging suits, pants, coats, t-shirts, shorts, tank tops, skirts, warm up suits, sweatshirts and sweatpants", in International Class 25[2]; and

LADY ENYCE
for "women's clothing, namely, shirts, tops, bottoms, pants, jackets, coats, jogging suits, warm-up suits, T-shirts, polo shirts, tank tops, skirts, shorts, denim shirts, denim pants, denim tops, denim bottoms, denim shorts, denim skirts, sweat shirts, sweat pants, sweat shorts, headwear, caps, hats", in International Class 25.[3]

Opposer further alleges that its marks “have been the subject of extensive press and media coverage”; that “in part due to the media attention given to opposer's marks, and in part due to opposer's extensive use of opposer's marks, [the marks] have acquired enormous value and goodwill and have become extremely well-known and famous”; that

[1] Registration No. 2093751, issued September 2, 1997, with a claimed date of first use anywhere and in commerce of August 31, 1996.
[2] Registration No. 2351411, issued May 23, 2000, with a claimed date of first use anywhere and in commerce of August 31, 1996.
[3] Registration No. 2338404, issued April 4, 2000, with a claimed date of first use anywhere and in commerce of July 31, 1998.

"given the highly unique nature of opposer's marks, there is a strong likelihood that consumers, viewing the mark ENYCE in respect of the goods for which registration is sought, are likely to believe that such goods derive from the same source as the goods sold under opposer's marks, or are affiliated, connected, associated, sponsored, approved or authorized by opposer"; and that "issuance of a registration of the ENYCE mark to applicant would seriously damage opposer in that it would be likely to cause confusion, deception or mistake among consumers and dilute the distinctiveness of opposer's marks."[4]

On May 9, 2005, applicant filed an answer denying the salient allegations in the notice of opposition.

We turn now to opposer's summary judgment motion.

The burden is on the party moving for summary judgment to demonstrate the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See Fed. R. Civ. P. 56(c); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The evidence of record must be viewed in a light favorable to the nonmoving party,

[4] Despite opposer's allegation that applicant's proposed mark will "dilute the distinctiveness" of opposer's marks, a dilution ground for opposition has not been properly pleaded because opposer does not allege that its marks became famous prior to the filing date of the subject application. See *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1174 (TTAB 2001) [plaintiff must allege (and prove) that its mark became famous prior to filing date of the trademark application being opposed].

and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Although applicant's evidence is quite limited, and he relies primarily on argument in response to the summary judgment motion, the burden is still on the moving party to demonstrate that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. After reviewing opposer's submissions, we conclude that opposer has not met its burden, and that there are genuine issues of material fact which preclude disposition of this matter by summary judgment. For example, genuine issues of material fact exist as to the possible relatedness of the respective goods of the parties and the degree of similarity as to the trade channels therefor.

In view thereof, and in accordance with Fed. R. Civ. P. 56, opposer's motion for summary judgment is denied.[5]

[5] The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial periods. *See Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

Proceedings herein are resumed and trial dates are reset as follows:

DISCOVERY PERIOD TO CLOSE:	**7/14/2006**
Thirty (30) day testimony period for party in position of plaintiff to close:	**10/12/2006**
Thirty (30) day testimony period for party in position of defendant to close:	**12/11/2006**
Fifteen (15) day rebuttal testimony period to close:	**1/25/2007**

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

* * *